

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Thi Nguyet Trinh

VISA APPLICANTS: Mr Hoang Dung Nguyen
Mr Hoang Vinh Nguyen
Mr Hoang Dung Nguyen

CASE NUMBER: 1418425

DIBP REFERENCE(S): OSF2014/027566

MEMBER: Hugh Sanderson

DATE: 16 November 2015

PLACE OF DECISION: Sydney

DECISION: The tribunal remits the applications for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.211 of Schedule 2 to the Regulations;
- cl.300.214 of Schedule 2 to the Regulations;
- cl.300.215 of Schedule 2 to the Regulations;
- cl.300.216 of Schedule 2 to the Regulations; and
- cl.300.221 of Schedule 2 to the Regulations.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration to refuse to grant the visa applicants Prospective Marriage (Temporary) (Class TO) visas under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicants applied for the visas on 21 April, 2014. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visas on 5 November, 2014 on the basis that the first named visa applicant did not satisfy cl.300.216 and cl.300.221 of Schedule 2 to the Regulations because the delegate was not satisfied that at the time of the application or at the time of the decision the parties genuinely intended to live together as spouses as defined in s.5F of the Act.

BACKGROUND

4. The review applicant was born in Vietnam and is currently 59 years old. She entered Australia in 1985 and has since become an Australian citizen. She has provided to the department a copy of her Australian passport. She has three sisters who continue to live in Vietnam. She was previously married to Hai Son Ho who she divorced on 27 July, 2011. She has four children currently aged 37, 35, 33, and 27 years old who reside in Australia.
5. The first named visa applicant (hereinafter the visa applicant) is a citizen of Vietnam and is currently 52 years old. The second named visa applicants are his children currently aged 25 and 24 years old. His mother and a brother and sister reside in Australia. He has two sisters and a brother who continue to live in Vietnam. The visa applicant divorced his wife, Thi Phu Nguyen, on 12 September, 2013.
6. It was claimed that the review applicant used to provide care for the visa applicant's mother in Australia. When the visa applicant was visiting Australia in 2009 he met the review applicant for the first time. In 2012 the review applicant travelled to Vietnam, taking with her a laptop computer which was a gift from the visa applicant's mother to his children. After the review applicant returned to Australia they maintained contact with each other and it was claimed that in June 2013 they developed close relationship. At the end of 2013 the visa applicant proposed marriage to the review applicant and she accepted.
7. The review applicant travelled to Vietnam in January 2014 with the visa applicant's mother, uncle and siblings and they held the engagement ceremony. It was stated that they planned to get married on 15 November, 2014 in Australia.
8. The review applicant's movement records indicate that she has travelled out of Australia since the parties first met as follows:
 - From 7 September, 2009 to 28 September, 2009;
 - From 30 December, 2009 to 14 January, 2010;
 - From 27 December, 2011 to 10 January, 2012;

- From 19 January, 2012 to February, 2012
 - From 18 January, 2014 to 14 February, 2014; and
 - From 20 November, 2014 to 6 December, 2014.
9. Various documents were provided by the applicant in support of the claim that the parties were in a genuine relationship. The department conducted an interview with the applicant 24 September, 2014.
10. The delegate who considered the application noted the following issues:
- Limited information as to the financial aspects of the relationship had been provided with the review applicant making two money transfers to the visa applicant totalling \$360;
 - Little information was provided indicating the parties had established a household at any time of their relationship;
 - There was limited information of the social aspects of the relationship, with the only photos provided showing the engagement;
 - None of the review applicant's family attended the engagement ceremony;
 - Limited information has been provided of any contact between the parties prior to the time of the application;
 - The parties appear to have committed to the relationship after spending only limited time together; and
 - Issues identified during the interview with the visa applicant raised concerns as to the genuineness of the relationship including:
 - He did not know of the review applicant's previous employment;
 - He did not know what the review applicant did prior to her migrating to Australia;
 - He did not know the names of the persons who the review applicant shared her home with;
 - He did not know if the review applicant had any friends in Vietnam; and
 - He did not provide clear details of different aspects of the review applicant's life.
11. In light of these issues, the delegate was not satisfied that the parties genuinely intended to live together as spouses or that they were in a genuine and continuing relationship. Accordingly, the delegate found that the visa applicant did not meet the criteria in cl.300.216 and cl.300.221 and refused the application.
12. The review applicant provided further material to the tribunal. This included the following:
- Photos of the parties and other family members together in Vietnam;
 - Evidence of money transferred by the review applicant to the visa applicant; and
 - Evidence of telephone calls made between the parties.

THE HEARING

13. The review applicant appeared before the tribunal on 16 November, 2015 to give evidence and present arguments. The tribunal also received oral evidence from the visa applicant.

The tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The review applicant was represented in relation to the review by her registered migration agent.

14. The parties provided consistent information as to various aspects of their lives. This included details of where they were both living, their work and the circumstances of their respective children. It was stated that the review applicant's daughters had travelled with her to Vietnam in November 2014 where they met the visa applicant. Details were provided of the various social activities the parties participated in over this trip to Vietnam by the review applicant.
15. The visa applicant gave his evidence in the very methodical manner where he tended to pause before answering any question. The review applicant said that this was just the nature of the visa applicant and he always spoke in that manner. Overall, the tribunal found the parties gave their evidence in a credible manner.
16. For the following reasons, the tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether the parties genuinely intend to live together as spouses.

DO THE PARTIES GENUINELY INTEND TO LIVE TOGETHER?

18. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). Whilst it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.
19. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the tribunal makes the following findings.
20. There is little information as to the financial aspects of the relationship. As the parties live in separate countries and neither have any significant assets or income, this is not surprising. Evidence was provided of the review applicant sending money to the visa applicant in Vietnam. No adequate explanation was provided to explain why this money was being sent. The visa applicant stated that he did not ask the review applicant to send it, and it would be unusual for a male fiancé to ask his partner to send him money, and the only explanation given by the review applicant was that she sent it to the visa applicant for the support of his children. The tribunal places little weight on this information as indicating a genuine relationship between the parties.
21. The tribunal accepts the evidence of the parties that when the review applicant has travelled to Vietnam she and the visa applicant have shared their expenses while travelling together.

22. There is little evidence of the parties having established a household together. Again, because of parties live in separate countries this is not surprising. The tribunal accepts the evidence of the parties that since their engagement ceremony whenever the review applicant has travelled to Vietnam she has been with the visa applicant and has lived with him in his home.
23. The parties participated in an engagement ceremony in Vietnam. This ceremony took place in the home town of the visa applicant. Friends and members of his family attended the ceremony. Although the review applicant's siblings who live in Vietnam did not attend, the visa applicant and the review applicant have visited her siblings together in Vietnam and stayed overnight there.
24. The review applicant has a close relationship with the visa applicant's family in Australia, and in particular his mother. This, in part, explains how the relationship between the visa applicant and the review applicant began. The tribunal accepts that their relationship is known of and encouraged by the visa applicant's family and in particular his family in Australia.
25. The review applicant's daughters have travelled with her to Vietnam and spent time together with the visa applicant. The review applicant gave evidence to the tribunal as to her children's attitude to her relationship with the visa applicant. Photos have been provided showing the parties together with members of the review applicant's family in Vietnam.
26. The tribunal finds that the social aspects of the relationship support a finding that the parties are in a genuine relationship and genuinely intend to live together as spouses. The tribunal accepts that their relationship is known by their friends and family and that this relationship is accepted by them.
27. The parties have known each other since 2009 and the visa applicant proposed marriage to the review applicant in 2013. They participated in an engagement ceremony in Vietnam in January 2014. They claim to have been in a committed relationship with each other for more than two years.
28. The parties provided consistent information to the tribunal as to various aspects of their lives and their relationship. This included their religious beliefs, the activities of their respective children, and their plans for their future together in Australia. The tribunal finds that the parties provide a degree of companionship and emotional support for each other which would be expected in a genuine and continuing relationship. The parties have provided evidence of their intention to marry each other in Australia. Their main wish for being able to marry in Australia is that this is where the majority of the review applicant's close family members live as well as the mother and two siblings of the visa applicant.
29. The tribunal finds that the parties have displayed a degree of commitment to each other which would be expected in a genuine and continuing relationship. This commitment they show to each other supports a finding that they genuinely intend to live together as spouses.
30. The tribunal finds that at the time of application the parties did have a genuine intention to live together as spouses, and therefore cl.300.216 is met.

DO THE PARTIES CONTINUE TO MEET TIME OF APPLICATION REQUIREMENTS?

31. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to

marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses.

32. The review applicant has provided to the department a copy of her Australian passport. She is an Australian citizen. As the visa applicant intends to marry the review applicant who is an Australian citizen he satisfies the criteria in cl.300.211 at the time of the application and at the time of the decision.
33. The parties have met each other in Australia and also in Vietnam. As they have met each other and were, at that time, over 18 years old, the criteria in cl.300.214 is met at the time of the application and at the time of the decision.
34. At the time of the application, the parties had arranged a marriage in Australia which was to take place on 15 November, 2014. This planned marriage was cancelled due to the refusal of the visa application. Although the parties have not set a date for a wedding at this time, the parties provided evidence that they genuinely intend to marry each other as soon as possible after the visa applicant is granted a visa and allowed to enter Australia. The tribunal is satisfied that the parties genuinely intend to marry both at the time of the application and at the time of the decision. The applicant therefore meets the criteria in cl.300.215.
35. As set out above, the tribunal is satisfied that the parties genuinely intend to live together as spouses both at the time of the application and at the time of the decision and meet the criteria in cl.300.216. As the visa applicant continues to satisfy the criteria in cl.300.211 and cl.300.214 to cl.300.216 the time of decision criteria in cl.300.221 is met.
36. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa. The applications for the second named visa applicant are remitted to be considered in full.

DECISION

37. The tribunal remits the applications for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
 - cl.300.211 of Schedule 2 to the Regulations;
 - cl.300.214 of Schedule 2 to the Regulations;
 - cl.300.215 of Schedule 2 to the Regulations;
 - cl.300.216 of Schedule 2 to the Regulations; and
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Hugh Sanderson
Member